No. 9015

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC STATES SAVINGS & LOAN COMPANY, a corporation, substituted for Reconstruction Finance Corporation, a corporation,
Appellant,

vs.

LEO F. SCHMITT, as Receiver of BANK OF NEVADA SAVINGS & TRUST COMPANY, CARSON VALLEY BANK, TONOPAH BANKING CORPORATION and VIRGINIA CITY BANK,
Appellees.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

PREFATORY STATEMENT

The principal claim of appellant is that the stocks in question were an appurtenance to the lands formerly owned by John G. Taylor and now owned by it, and as such appurtenance passed with a conveyance and mortgage of the lands, without the necessity of any specific description or other formality of transfer.

Secondarily, it is claimed by appellant that the deed in 1930 and the mortgage in 1932, in the light of the circumstances shown by the record, were sufficient to constitute

All emphasis herein is supplied by us.

a conveyance of the water stocks treated as personalty, and that the Bank of Nevada Savings & Trust Company, in whose shoes appellee stands, had actual notice and knowledge of these antecedent transactions, so that, as pledgee, it is in no position to assert a superior claim thereto; and that the other banks for which appellee is receiver, claiming to be mere attaching creditors of one who had, long prior to the attachment, parted with all interest in the stocks, have no rights therein.

Appellee in his brief, contends:

1. That by reason of certain common officers of the Reno National Bank and the Bank of Nevada Savings & Trust Company, he has some superior equity as against appellant.

2. That the deed and mortgage were insufficient to convey or encumber the stock, since it is claimed

(a) The mortgage was not executed with the formalities required by the Nevada law in respect to chattel mortgages;

(b) There was not an open and continuous change of possession of the stock certificates;

(c) The description of the stock was uncertain; and,

(d) The transfer was not in the form of an endorsement on the certificates.

3. That the stock is not appurtenant to the lands.

No exception is taken to the statement of facts contained in our opening brief. The facts are simple and practically undisputed. The companies, whose stock is in controversy, have not and never have had any activity other than the ownership and maintenance of certain facilities for impounding the water of the Humboldt River and transmit-

ting it to the lands of their stockholders. Throughout the corporate history of these companies the lands now owned by appellant have been irrigated by use of the water companies' facilities. The District Court found that all water rights are appurtenant to appellant's lands, and that under Nevada law such water right includes the easement to have water conveyed from the place of diversion to the place of use. Appellee admits (brief, page 45) the correctness of this ruling. The primary question, therefore, is whether the *stock* of these companies, representing in fact nothing more than the right to the use of their facilities, is itself an appurtenance of the lands. Appellee admits that the stock in question represents the water rights (brief, page 30). Since the water right necessarily can exist only as an appurtenance to land, the stock which represents the right must also be an appurtenance. If this be so, it completely disposes of the case, as there is no question of appellant's title to the lands and any appurtenances which could have passed by a deed of the lands.

THE STOCK IS AN APPURTENANCE

All of appellee's arguments respecting the irregularity in the mode of transfer or encumbrance of the water stocks may be wholly disregarded if the stocks constitute appurtenances to the lands so as to pass with the conveyance of it. A similar situation was considered in *San Gabriel Valley Bank v. Lakeview, etc. Co.*, 4 Cal. App. 630, 633, where the court said:

> "Appellant McNutt makes the point that the mortgage of the water stock is ineffectual as to him, arguing that it is personal property and not of the list subject to be mortgaged under the statute, and is not

> mortgaged with the formalities required * * * and though it may be good as between the parties, it is not operative as against him without an averment of notice or knowledge on his part which is not contained in the complaint. The point appears to us to be without merit for two reasons: (a) the stock is declared by the mortgage to be a water right appurtenant to the land. Anything appurtenant to the land passes with it***."

In other words, the mode of transfer of the stock is entirely immaterial if the stock was an appurtenance to the land, since, in that event, a conveyance of the lands (admittedly made) would without more pass the stock as such appurtenance.

Appellee also concedes that the stocks here in question represented the water rights appurtenant to the Taylor lands. At page 30 of his brief, he says:

> "It must be observed in the beginning that whatever water covenants went with the land held, owned and possessed by John G. Taylor personally, were merged in these various companies and held, owned and *represented* through the shares of stock issued by them."

At page 45 of his brief, appellee concedes that the district court rightly concluded that appellant is the owner of the water rights appurtenant to the lands. Under the law of Nevada, as construed by the Supreme Court of that state in *Prosole v. Steamboat Canal Co.,* 37 Nev. 154, 140 Pac. 720, water rights are inseverable from the land. They can exist only *as an appurtenance to land.*

In the *Prosole* case, the Supreme Court of Nevada said (140 Pac. at p. 722):

> " * * * a water right for agricultural purposes, to be available and effective, *must be attached to the land*

and become in a sense appurtenant thereto by actual application,''

and also that (140 Pac. at pages 723, 724):

> '' * * * the very right itself, relating as it does to the land upon which it is applied, although in a sense incorporeal, nevertheless, by reason of its application, becomes *an integral part of the freehold.* The water and the land to which it is applied become so interrelated and dependent on each other in order to constitute a valid appropriation that the former *becomes by reason of necessity appurtenant to the latter.''*

If, as appellee concedes, the stocks in controversy represented the water rights, the stocks are appurtenant to the land since the right they evidence can exist only as an appurtenance to land. This would seem to dispose of the case.

In other jurisdictions, water rights may be severed from land and be transferred apart from the land. It is in such jurisdictions that the cases arose upon which appellee relies in his claim that the stock is not appurtenant. Whatever might be the case if severance were possible in Nevada, the fact is that here there was no severance nor attempt to sever the water rights from the Taylor lands, and the District Court properly found that from the beginning the water rights, and the easement to use the facilities of the water companies in enjoyment of that right, were always appurtenant to the lands now owned by appellant. The adjudication of water rights by the state court (Ex. 10, R. 101) and the certificates of appropriation (Ex. 11 and 12, R. 107-112) both show that the water rights which appellee says were represented by the stock, exist solely as appurtenances of the lands where used. The findings of fact (R. 55) are in accord. Such being the case, it is

unnecessary to consider texts or cases which treat of a situation where the water right has been severed from the land.

Of the eight cases cited by appellee in support of his contention, four of them (*Consolidated Peoples Ditch Co. et al. v. Foothill Ditch Co.*, 205 Cal. 54; 269 Pac. 915; *Imperial Water Co. v. Meserve,* 62 Cal. App. 593, 217 Pac. 548; *Palo Verde, etc. Co. v. Edward*, 82 Cal. App. 252, 254 Pac. 922; and *Wheat v. Thomas*, 209 Cal. 306, 287 Pac. 102) are California cases, decided after the adoption of the 1895 amendment to Section 324 of the California Civil Code (now Section 330.24), prescribing certain formalities which must be complied with in order to make stock appurtenant to land. They are all founded upon a statute, no counterpart of which is to be found in Nevada. Prior to the adoption of the amendment, as held in *In re Thomas' Estate,* 147 Cal. 236, the law of California was the same as the law of Montana, Idaho and Utah, as declared by the Supreme Courts of those states in *Yellowstone Valley Company v. Association Mortgage Investors,* 88 Mont. 73, 290 Pac. 255, and the other cases cited in appellant's opening brief.

Of the four remaining cases, two (*Oppenlander v. Left-Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 854, and *Oligarchy Ditch Co. v. Farm Inv. Co.*, 40 Colo. 291, 88 Pac. 443) are decisions of the Supreme Court of Colorado, which, as pointed out in *Yellowstone Valley Company v. Associated Mortgage Investors*, 88 Mont. 73, 290 Pac. 255, are at variance with the rule adopted in all other Western states. But even the Colorado courts do not go to the extent of holding stock in water companies to be not appurtenant to the land where the articles of incorporation contain provisions similar to those contained in the articles of the Humboldt-Love-

lock Irrigation Light & Power Company (Record, p. 85), as is demonstrated by the recent decision of the Supreme Court of Colorado in *James v. Barker*, 99 Colo. 551, 64 Pac. (2) 598.

Of the two remaining cases cited by appellee, the Utah case (*George v. Robinson, et al.*, (Utah) 63 Pac. 819) was distinguished from cases such as this in *In re Johnson's Estate*, 64 Utah 114, 228 Pac. 748, and the Idaho case (*Wells v. Price*, 6 Idaho 490, 56 Pac. 266) is directly contrary to the later decision of the Supreme Court of Idaho in *Ireton v. Idaho Irrigation District*, 30 Idaho 310, 164 Pac. 687.

Even if the cases cited by appellee were authority for the proposition that ordinarily stock in a ditch and reservoir company is not appurtenant to the land, they would have no application to the present case, where the water rights have never been severed from the land and are vested in the landowners and not in the corporations.

Since the only beneficial rights represented by the stock are rights to the use of the facilities of the respective corporations for the diversion and conveyance of water, and since these rights, as found, declared and adjudged by the court below, in its opinion (Record, p. 41), findings and decree, are appurtenant to the land upon which the water has been applied to a beneficial use, it necessarily follows that the stock itself is appurtenant. In the hands of one other than the appellant, the stock "has no value actual or potential except for nuisance purposes," *Twin Falls L. & W. Co. v. Twin Falls Canal Co.*, 7 Fed. Supp. 238 at page 246 (affirmed C.C.A. 9, 79 Fed. (2), 431, Cert. denied, 80 L. ed. 466).

APPELLEE HAS NO EQUITY SUPERIOR TO APPELLANT

Appellee argues that inasmuch as The Reno National Bank and the banks of which appellee is receiver had common officers and directors, the appellee should be adjudged to have the paramount right to the stock regardless of all other considerations. This argument is based on the principle that transactions between banks or corporations having common directors are viewed with suspicion and will not be sustained unless entirely fair to both corporations. This principle can have no room for application in the case at bar. No contract or transaction between The Reno National Bank and The Bank of Nevada Savings & Trust Company is sought to be set aside or rescinded or enforced. As a matter of fact, the record fails to disclose any contract, transaction or dealing between the two banks, of any nature whatsoever, regarding the subject matter of this suit. There is, therefore, nothing upon which the principle relied upon by the appellee can operate.

Aside from this, however, the record shows no breach of trust or duty on the part of the officers of the two banks with which appellant can be charged. When, on April 23, 1932, The Reno National Bank assigned the Taylor mortgages to the Reconstruction Finance Corporation, neither that bank nor its officers committed any breach of duty or trust toward the Bank of Nevada Savings & Trust Company. When, a month later, the Bank of Nevada Savings & Trust Company made its advances to John G. Taylor, Inc., the officers of that bank may or may not have been guilty of having committed a breach of trust or duty; but if they were, neither the Reconstruction Finance Corporation nor its successor, the appellant, could be prejudiced by it, since neither had any knowledge that the advances were made, nor did either participate in or sanction the making there-

of. Nor did either have any knowledge of, or any active or tacit participation in, the alleged pledge of the stock to the Bank of Nevada Savings & Trust Company.

If appellee's argument were carried to its logical conclusion, it would follow as a necessary consequence that if a corporation sells property to a third party and subsequently sells the same property to an affiliated company, the latter, from the mere fact alone that it has the same officers and directors, would obtain a better title than the third party.

The fallacy of appellee's argument lies in the failure to distinguish between the Reconstruction Finance Corporation and its successor in interest, the appellant, on the one hand, and The Reno National Bank, the assignor of the Reconstruction Finance Corporation, on the other. An assignee takes subject to equities and defenses existing at the time of the assignment, but once the assignment has been made nothing assignor may do can in any manner impair the title of the assignee. True, a subsequent assignee may, under certain circumstances, be entitled to priority over a prior assignee, but, as pointed out in *Salem Trust Co. v. Manufacturers Finance Co.,* 264 U. S. 182, 197, 198; 68 L. ed. 628, 635, this results, in the absence of statute, only where by some act or omission of his own the prior assignee has estopped himself from asserting priority over the later assignee. In the case at bar, as appellee concedes, the Bank of Nevada Savings & Trust Company made the advances and obtained possession of the stock certificates with full knowledge of the fact that the stock had previously been hypothecated to the Reconstruction Finance Corporation. The advances were made and possession of the stock certificates was obtained by the Bank of Nevada Savings & Trust Company without knowledge or consent of the Re-

construction Finance Corporation, and there is nothing in the record to show that any act or omission on the part of the Reconstruction Finance Corporation misled the Bank of Nevada Savings & Trust Company in any manner.

THE TRANSFER AND MORTGAGE OF THE STOCKS WAS VALID AS AGAINST APPELLEE

Even though the stocks were not appurtenant to the lands, the 1930 deed and the 1932 mortgage were effective to convey and encumber the same as between the parties and as against the world except a bona fide purchaser or encumbrancer for value.

The objections urged by appellee to the mode of transfer can not be availed of by him since he is not such a bona fide purchaser or encumbrancer. As receiver, appellee stands in the shoes of the banks for which he is acting in that capacity. The Bank of Nevada Savings & Trust Company, as pledgee, admittedly had actual knowledge of the antecedent transactions, and is not a bona fide purchaser or encumbrancer. The other banks for which appellee is acting, are mere attaching creditors, whose rights accrued long after the party whose rights they sought to attach, had parted with all interest in the property.

All of the contentions advanced by appellee as to the irregularity in the mode of transfer depend entirely on the question whether appellee is a bona fide purchaser.

We will, therefore, first discuss that question, and then the several contentions advanced by appellee respecting the mode of transfer.

Appellee concedes that the Bank of Nevada Savings & Trust Company had full actual knowledge of the mortgage and its assignment to appellant's predecessor in interest,

but seeks to escape the effect of that knowledge on the ground that The Reno National Bank and the Bank of Nevada Savings & Trust Company had the same officers and directors. Thus, on page 16 of his brief, appellee says:

> "Certainly the Bank of Nevada Savings & Trust Company as a creditor had notice of the mortgage, but this notice was had through the common directorate of both banks."

Again, on page 46 of his brief, appellee says:

> "We are making no contention here of a repudiation of Mr. Sheehan's knowledge, but we are urging that when he, as an agent of the Bank of Nevada, accepted the stock certificates in pledge for a loan by that bank, he repudiated and waived all claim he ever had to that stock as a representative and agent of the Reno National Bank."

Appellee cannot escape the effect of the actual knowledge of the officer of the Bank of Nevada Savings & Trust Company on the ground that that Bank and The Reno National Bank had the same officers and directors. The fact remains that they were the sole representatives of the Bank of Nevada Savings & Trust Company. Being the sole representatives, there was no one from whom they could have concealed or communicated the information. Such being the case, the Bank of Nevada Savings & Trust Company stands charged with their knowledge.

> "If Cornish was the sole representative of the bank in the transaction with himself, there was no one from whom information could have been concealed or to whom it could have been communicated. If he was the sole representative of each party, each must have had equal knowledge. As the representative of the bank, his knowledge was not affected by his private interests, however

much his conduct may have been. He necessarily knew as much in one capacity as he did in the other. The bank is charged with the knowledge which Cornish had."

First National Bank v. Blake, 60 Fed. 78, 79.

See also *National Bank of San Mateo v. Whitney,* 40 Cal. App. 276, 283; 180 Pac. 845; 2 Am. Jur., 300.

Independently of this rule, there is another reason why appellee cannot escape the effect of the actual knowledge of the officers of the Bank of Nevada Savings & Trust Company. The Reconstruction Finance Corporation, appellant's predecessor in interest, did not authorize or participate in the making of the advances and actually had no knowledge of the fact that they were made until long afterwards. In these circumstances, the appellee cannot escape the effect of the knowledge of the Bank's officers by charging that in making the advances they were acting adversely to the Bank of Nevada Savings & Trust Company.

"The fact that those agents committed a fraud cannot alter the legal effect of their acts or of their knowledge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud and no knowledge that any such fraud had been perpetrated. There is no pretense of any evidence that the defendants had any connection with these alleged frauds and no pretense that they had any knowledge of their existence if they did exist. *In such case the rule imputing knowledge to the company by reason of the knowledge of its agent remains.*"

Armstrong v. Ashley, 204 U. S. 272, 283, 51 L. ed. 482, 487.

Appellee as receiver of the Bank of Nevada Savings & Trust Company is not, therefore, an innocent purchaser,

and is in no position to attack the mortgage under which appellant claims. A receiver, as stated by appellee, stands in no better position than the bank or corporation which he represents.

Organ v. Winnemucca State Bank & Trust Co., 55 Nev. 72, 26 Pac.(2) 237, 238.

As receiver of the banks other than the Bank of Nevada Savings & Trust Company, appellee is a mere attaching creditor, not of John G. Taylor, Inc., but of John G. Taylor, individually. As such, he is obviously not an innocent purchaser for value.

> "It cannot be successfully maintained that an attaching creditor stands in the position of a bona fide purchaser for value. He has in fact parted with nothing of value, but has merely instituted an action in which he utilizes the provisional remedy of attachment for the purpose of rendering more secure the judgment which he hopes to obtain. (4) An attachment lien attaches only to the debtor's interest in the property at the time of its levy (3 Cal. Jur., p. 483; *National Bank v. Western Pac. Ry. Co.*, 157 Cal. 573, 576, (21 Ann. Cas. 1391, 27 L.R.A. (N.S.) 987, 108 Pac. 676).) In *National Bank v. Western Pac. Ry. Co.*, supra, it was held that the purchaser for value of stock in a corporation, which was not transferred on the books of the corporation at the time of an attachment levy in a suit brought by a creditor of the seller, may compel a transfer upon the books of the corporation and the issuance of a certificate for the stock free from the attachment lien."

Ahern v. Tulare Lake Canal Co., 115 Cal. App. 93, 101, (2) 490.

In view of the foregoing, we respectfully submit that under no circumstances can the appellee be said to be an

innocent purchaser or encumbrancer without notice. With this foreword we may proceed to consider appellee's arguments. In order to permit of a more orderly consideration of the subject, the four arguments or contentions urged by the appellee will be discussed in a slightly different order than that in which they are advanced in appellee's brief.

The Transfer of the Stock by Taylor to John G. Taylor, Inc., Was Not Void Under Sections 1617 and 1722 N.C.L. 1929 or the By-Laws of the Respective Companies

Appellee argues that the transfer of the stock by the deed executed and delivered by John G. Taylor to John G. Taylor, Inc. in 1930 (Appellant's Ex. 1) was ineffectual to pass title to the shares as against the appellee as a subsequent pledgee and creditor of John G. Taylor, because of the provisions of Sections 1617 and 1722 N.C.L. 1929. The two sections are substantially identical. Section 1617 applies only to corporations organized under the Corporation Law of 1925, and since none of the corporations involved in this action was organized under that act, no further consideration need be given to it.

Section 1722 can afford appellee no help, for contrary to appellee's contention, the section does not restrict the manner in which shares of stock may be transferred. It merely prescribes a mode by which transfers of shares may be made and does not prohibit a transfer by other methods nor declare that when made in another manner a transfer may not be enforced by the party entitled to the shares. Thus, in *Young v. New Pedrara Onyx Co.*, 48 Cal. App. 1, 192 Pac. 55, the court, in construing a similar California statute, said:

> "A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being

nothing more than evidence of its existence, it is obvious that, in the absence of any controlling statutory inhibition, the shares, without an assignment or delivery of the certificate, may be assigned in any manner appropriate to the transfer of incorporeal personal property, as, for example, by a bill of sale, or any mode that will suffice to pass title to a chose in action or intangible property. The *jus disponendi* in shares of stock is an incident of ownership, and may be exercised in any manner not prohibited by law. (*Lipscomb v. Condon,* 56 W. Va. 416, (107 Am. St. Rep. 938, 67 L.R.A. 670, 49 S.E. 392).

"* * * we are satisfied that even where, as here, certificates have been issued, a transfer of title, good as between the parties thereto, may be made in manner other than that recognized as a lawful mode of transfer by Section 324; that a transfer of title, good as between the parties, may be made in any manner appropriate to the assignment of choses in action or intangible personal property, * * *"

A transfer valid as between the parties is of course valid as against all the world, excepting only innocent purchasers and encumbrancers for value. Thus in construing a statute which in express terms provided that unregistered transfers of stock should not be valid "except between the parties," the California courts have uniformly held that such transfers of stock "are nevertheless valid as against all the world except subsequent purchasers in good faith without notice."

National Bank v. Western Pac. Ry. Co., 157 Cal. 573, 108 Pac. 676;
People v. Elmore, 35 Cal. 653;
Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. 329.

Neither the Transfer of Stock to John G. Taylor, Inc., Nor the Mortgage Thereof to the Reno National Bank Was Void Under Sec. 1536 N.C.L. 1929

Corporate stocks are incorporeal property incapable of possession.

> *Jean v. Jean,* 207 Cal. 115, 120, 277 Pac. 313;
> *Payne v. Elliott,* 54 Cal. 339;
> *Vidal v. South Amer. Securities Co.,* 276 Fed. 855, 868.

Notwithstanding this, appellee contends that the transfer of the water stock to John G. Taylor and the mortgage thereof was void under the provisions of Section 1536, N.C.L. 1929, which provides that a sale of "goods and chattels" is void as to creditors of the seller and subsequent purchasers in good faith, unless there be an immediate and continued change of possession.

It is impossible to conceive how this section can be made to apply to things which by their very nature are incorporeal, incapable of possession and not susceptible of manual delivery. Not only is this so, but it has been affirmatively held that similar statutes do not apply to stocks and bonds (*Westinghouse Electric & Mfg. Co. v. Brooklyn R. T. Co.,* 288 Fed. 221, 239).

The fallacy of appellee's argument to the contrary results from the failure to distinguish between certificates for corporate stock and the stock itself. The two are not the same.

A stock certificate is evidence of the title to stock and is not the stock itself, nor is it necessary to the existence of the stock.

> *National Bank v. Watsontown Bank,* 105 U. S. 217, 222, 26 L. Ed. 1039;

The statute requires an actual and continued change of possession of "the things sold or assigned." It does not require a change of possession of the muniments of title of the things sold or assigned.

It is submitted, therefore, that appellee's contention that the transfer of the stock to and hypothecation thereof by John G. Taylor, Inc. was void under Section 1536, N.C.L. 1929, is without merit. A statute requiring a change of possession cannot be applied to a thing which from its very nature is incapable of physical possession.

The Mortgage Was Not Void Under Section 987, N.C.L. 1929

For much the same reason, appellee's argument that the mortgage under which appellant claims was void under Section 987, N.C.L. 1929, not valid. The section mentioned provides that a chattel mortgage is void as against creditors of the mortgagor and subsequent purchasers and by encumbrancers of the mortgaged property unless affidavits of good faith are appended thereto.

This statute is substantially identical to similar statutes adopted in almost every state of the union. Such statutes uniformly have been construed as inapplicable to mortgages of intangibles such as corporate stock. In *Jones on Chattel Mortgages,* 5th ed., sec. 278, it is said:

> "*Choses in Action.*—Statutes respecting the recording of mortgages of personal property apply only to goods and chattels capable of delivery, and not to defeasible or conditional assignments of choses in action. It is not necessary to the validity of such assignments that they be recorded. The capital stock of a corporation is not goods and chattels within the meaning of the act concerning chattel mortgages, and therefore a

mortgage of such stock need not be filed or recorded, and the record of it is of no effect."

See also: *Williams v. New Jersey S. R. Co.,* 26 N. J. Eq. 398, 403; *Westinghouse, etc. Co. v. Brooklyn R. T. Co.,* 288 Fed. 221, 229.

Considering the purpose and background of the statute, there is no reason why the Nevada Statute should be construed differently from its counterparts in other states. It was intended to apply and in fact does apply only to mortgages of tangible personal property and not to mortgages or defeasible assignments of choses in action or other intangibles. It has, therefore, no application whatsoever to the case at bar.

Moreover, appellee is not a subsequent purchaser or encumbrancer in good faith, notwithstanding the fact that the stock is described in the pledge agreement executed by John G. Taylor to the Bank of Nevada Savings & Trust Company. The uncontradicted testimony of appellee's own witness shows conclusively, and appellee in his brief admits, that at the time the Bank of Nevada Savings & Trust Company made the advances it had full knowledge of the fact that the stock had been hypothecated to the Reconstruction Finance Corporation. As hereinbefore shown, appellee is chargeable with that knowledge.

The Mortgage Is Not Void for Indefiniteness

Appellee urges that even if the mortgage is sufficient to create a valid lien upon the stock, as between the parties to it, it is not sufficiently definite to create a valid lien on the stock as against third parties. No consideration need be given to this contention for the reason that as herein-

before shown, the Bank of Nevada Savings & Trust Company had full knowledge of the hypothecation of the stock to the appellant's predecessor in interest, the Reconstruction Finance Corporation. In such circumstances, appellee is not in any position to assert that the description contained in the mortgage is insufficient to create a valid lien on the stock:

> "Insufficiency or inadequacy of description in a chattel mortgage is an attack open to creditors, incumbrancers, and purchasers in good faith, whom it is sought to affect by reason of the constructive notice attaching to the recording or filing of the mortgage; but, inasmuch as actual notice is of a higher character than constructive notice, one who has actual knowledge of the existence of the mortgage and of the property affected thereby cannot avail himself of any lack of sufficiency of description as could one to whom constructive notice alone was attributable. The creditor with actual knowledge of all the facts does not rely upon the public records to give him constructive notice of that which he already knows."
>
> *Fenby v. Hunt,* 53 Wash. 127, 101 Pac. 492, 493.

As receiver of the banks other than the Bank of Nevada Savings & Trust Company, appellee is a mere attaching creditor of John G. Taylor. Whatever interest Taylor had in the stock passed to John G. Taylor, Inc. in 1930, long prior to the time appellee levied his attachment. As an attaching creditor, therefore, appellee has no lien on the stock and is not in a position to attack the sufficiency of the mortgage.

> *Stowe v. Harvey,* 241 U. S. 199, 60 L. ed. 199, 36 Sup. Ct. 541.

None of the four legal defenses urged by the appellee, although plausibly advanced, is well founded, even if the stock is not appurtenant to the land. If the stock is appurtenant to the land, then, as we pointed out at the outset of our discussion, all of the legal defenses advanced by the appellee are wholly irrelevant and immaterial, for the reason that whatever is appurtenant to the land will pass with the conveyance of it.

The decree should be reversed, with instructions to enter a decree adjudging appellant to be the owner of the stocks described in the complaint, free from any claim of appellee, and directing the surrender of the certificates for such stocks to appellant.

Respectfully submitted,

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